

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. B-09/08-414  
 )  
 Appeal of )

# INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) that she abused a vulnerable adult. The parties stipulated on the record that A.M. is a vulnerable adult who does not have the capacity to participate in the hearing. The following decision is based on the evidence adduced at hearing.

## FINDINGS OF FACT

1. The petitioner worked as an Individual Assistant for Special Needs Students (Para educator) with a school district. Petitioner provided one on one services to severely disabled students for approximately seventeen years. During her employment with the school district, petitioner received very good annual performance evaluations for the 1998/1999 school year through the 2006/2007 school year.

2. The precipitating incident took place on February 21, 2008. Petitioner worked with A.M., then nineteen years old. Petitioner worked with A.M. for a four year period.

3. A.M. is a severely disabled young man. He has significant developmental delays, has significant learning needs, is visually impaired, has a seizure disorder, and has difficulty ambulating. A.M. uses a walker; he has limited ability to walk and stand in a swimming pool. A.M. has the cognitive abilities of a child between the ages of two to four years old. He has good upper body strength.

4. M.J.R. is a special educator with the school district. She testified by telephone. M.J.R. had been A.M.'s case manager for two years and his teacher on occasion. M.J.R. described A.M.'s behavior when he escalates or becomes noncompliant or oppositional. A.M. becomes loud, red in the face, throws his glasses, and has pushed furniture, etc. She stated that the protocol is to allow him to work out of it as long as it is safe to do so.

5. The school district provided training to staff giving them information how to deescalate student behaviors. The petitioner said these trainings occur annually. Trainings have not specifically mentioned dealing with behavior issues in a pool program, but there is no reason that the general techniques would not be transferable to the pool setting. They are not to use restraints. Petitioner gave examples of how she deescalated behaviors by trying to

refocus the student, changing the subject, acting silly, calming the student, or asking for help.

6. The school district has a contract with a local fitness center to use their swimming pool for individualized adaptive physical education and physical therapy programs for special needs students between the ages of sixteen to twenty-two years old. The school district uses two lanes of the pool; three walls of the pool are around the first lane. The second lane is adjacent to the first lane. Each student has an individualized program that he/she does with his/her Para educator or support person unless the student can do his/her program independently. The school district has a contract with L.Si., a recreation therapist, who works with staff and students during the pool program. The students attend this program two times per week.

7. On February 21, 2008, six students, their Para educators or aides, and L.Si. were present at the pool. The following people witnessed the incident between petitioner and A.M. and provided testimony at the hearing:

(1) L.Si., recreational (aquatic) therapist employed by Fletcher Allen Health Center.

(2) Mi.C., a Para educator with the school district at the time of the incident.

(3) L.Sa., autism interventionist with the school district.

(4) Ma.C., Para educator employed by the school district.

8. A.M.'s program included abdominal crunches. To do these exercises, the petitioner stood with her back to the wall of the pool. A.M. stood in front of the petitioner with his back to her chest. The petitioner and A.M. were about the same height. The petitioner supported A.M. under his arms and around his chest while he brought his knees up. On February 21, 2008, petitioner was in the second lane with her back against the pool wall and A.M. was in front of her. The water depth was four feet.

9. The entire incident took place in less than twenty-five (25) seconds. A.M. did not want to do the abdominal crunches. A.M. was noncompliant, splashing, and vocalizing. The petitioner asked A.M. to do his program. When he said "no", petitioner put her hands on A.M.'s shoulders and dunked A.M. This happened three times. Petitioner did not warn A.M. that she was going to dunk him. After the third time, A.M. settled down and continued his program. The remainder of A.M.'s program took approximately twenty minutes.

10. L.Si. was in the pool heading towards the petitioner and A.M. L.Si. heard the petitioner ask A.M. if

he was ready to work. A.M. said no and splashed the water. She saw the petitioner push A.M. under the water. L.Si. was not sure what she saw. L.Si. saw petitioner repeat her actions a second time. L.Si. testified that she was taken aback and moved to step in. A.M. was dunked a third time. L.Si. estimated that the incident took ten to fifteen seconds.

L.Si. testified that A.M. looked visibly shaken and that she needed to right his glasses. She stated that A.M. was off-balance the third time. She testified that petitioner asked A.M. again if he was ready to work and he said yes. A.M. was able to do the remainder of his routine.

L.Si. had worked with petitioner for many years and was surprised. She testified that before this incident, she thought petitioner was one of the best aides she worked with. L.Si. testified that she was concerned for A.M. because he is not stable on his feet and he cannot always right himself. She was concerned that he would aspirate water.

11. Mi.C. was working with his student on February 21, 2008. He testified that he was supporting his student and walking laps. He was not paying attention until he heard A.M. slap the water and say no. He testified that A.M. seemed agitated. He saw petitioner push A.M. with both hands

under the water three times. He was approximately ten feet away from petitioner and A.M. He testified that he was surprised and uncomfortable by what he saw. Mi.C. had looked up to petitioner and sought her out for advice. He stated that it did not seem that petitioner and A.M. were playing a game. He testified that he believed the dunking was being used to control A.M. He thought a line had been crossed the third time A.M. was dunked.

12. L.Sa. was monitoring her student who has a visual program to follow. L.Sa. was in the first lane on the same side of the pool as petitioner; she was approximately one lane from the petitioner. L.Sa. testified that she heard A.M. vocalize and saw A.M. flailing. She testified that she heard petitioner say that A.M. needed to do his program and heard petitioner ask A.M. if he was ready. A.M. said no. L.Sa. stated that she saw petitioner's hands on A.M.'s shoulders and that she pushed A.M. under. Petitioner did not go underwater with A.M. The sequence happened three times. L.Sa. testified that she was surprised by what she saw. She testified that petitioner told her later that petitioner was upset and shaking.

13. Ma.C. was in the pool with a student. Ma.C. testified that A.M. was agitated, vocal, angry and splashing.

She stated that A.M. was forcing himself back during his splashing motion. She testified that petitioner looked upset. Ma.C. testified that she saw petitioner's hands on A.M.'s shoulders when petitioner dunked A.M. three times. Ma.C. stated that she saw L.Si. was close to petitioner and she thought L.Si. would step in. After the dunking, A.M. resumed his workout.

14. Petitioner testified that A.M.'s cognitive level was of a three or four year old. She described A.M. as a "good kid" who had problems dealing with transitions. The incident occurred during a transition in his pool program to abdominal crunches. The petitioner explained that A.M. can swim a little with his face in the water.

Petitioner described the incident. She had her back against the pool with A.M. in front of her. She estimated that the incident lasted less than twenty-five seconds. She stated that A.M. was pushing with his feet which, in turn, pushed her back against the wall. Petitioner stated she stopped A.M. and told him he was hurting her. A.M. kept pushing back. The petitioner testified that she saw L.Si. coming towards them. Petitioner testified that A.M. escalated his behavior by jumping, splashing, screaming and saying no when she asked him if he was ready for his program.

Petitioner stated she dunked him three times to redirect his behavior. The third time petitioner dunked A.M., she gave him a bit more control so he could bring himself up. He lost his glasses at this point. After the last dunking, A.M. agreed to do his program and did so.

Petitioner also testified that she dunked petitioner because she was thinking fast and thought A.M. would associate dunking with fun because they sometimes ended their program with dunking as a fun activity. Petitioner explained that she usually dunked A.M. at the end of their pool program and that she told A.M. he was being dunked before she did so. She testified that the dunking would be play for A.M. but had to concede that the dunking that day was not fun for A.M.

After the pool program, petitioner told L.Si. that she was shaking. After finishing the crunches, petitioner told L.Sa. that her hands were shaking.

15. L.Si. and L.Sa. saw petitioner dunk A.M. as part of play on other occasions. They both did not consider this incident play. Ma.C. testified that on the day in question the dunking did not look playful but angry.

16. On February 21, 2008, the petitioner spoke with M.J.R. M.J.R. testified that she had worked for fifteen years with petitioner. M.J.R. testified that petitioner



reported having a rough morning at the pool with A.M. and that she had to dunk A.M. several times because he was agitated and noncompliant. M.J.R. testified that petitioner indicated she was frustrated by what happened. M.J.R. was concerned about A.M.'s safety and questioned petitioner about safety. She was assured by petitioner that A.M. was safe.

17. M.J.R. testified that she has observed petitioner deal with students' escalating behaviors. M.J.R. has witnessed petitioner ask for help in group settings and seen petitioner redirect students. M.J.R. was surprised that petitioner did not ask for help.

18. The incident was reported to Adult Protective Services (APS) on or about February 26, 2008 and assigned to L.D., APS investigator, on or about February 27, 2008. L.D. testified that petitioner explained that she dunked A.M. three times in order to redirect his behavior because she was concerned about A.M.'s safety. L.D. stated that petitioner described the experience as intense and nerve-wracking. The report was substantiated. This appeal followed.

ORDER

DAIL's decision to substantiate abuse is reversed.

REASONS

The Commissioner of the Department of Aging and Independent Living (DAIL) is required by statute to investigate allegations of abuse, neglect or exploitation of vulnerable adults, and to keep those records that are substantiated in a registry under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911(b). The statute's purpose is to "protect vulnerable adults whose health and welfare may be adversely affected through abuse, neglect or exploitation". 33 V.S.A. § 6901.

If a report has been substantiated, the person who has been found to have committed abuse/neglect/exploitation may apply to the Human Services Board for relief that the report is not substantiated. 33 V.S.A. § 6906(d).

Abuse has been defined in the statute protecting vulnerable adults at 33 V.S.A. § 6902, as follows:

(1) "Abuse" means:

(A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to a vulnerable adult;

(C) Unnecessary or unlawful confinement or unnecessary or unlawful restraint of a vulnerable adult;

(D) Any sexual activity with a vulnerable adult by a caregiver who volunteers for or is paid by a caregiving facility or program...

(E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress; or

(F) Administration, or threatened administration of a drug, substance or preparation to a vulnerable adult for a purpose other than legitimate and lawful medical or therapeutic treatment.

DAIL based its substantiation upon subsections B and E.

The Board has found that one act alone can rise to the level of abuse. Fair Hearing No. 20,389. In analyzing cases, the Board has differentiated behavior that is reckless from behavior that is unnecessary, inappropriate, or unprofessional.

For example, the Board affirmed substantiation in Fair Hearing No. 20,389 based on one incident by an otherwise

exemplary employee who pushed a nursing home resident in a direction against her will with sufficient force so that she fell. In that case, the petitioner denied pushing the nursing home resident although there was eye-witness testimony from others. On the other hand, the Board reversed substantiation when an employee abruptly placed his hand on a nursing home resident's chin to get the person's attention by determining that the action was unnecessary, inappropriate, and unprofessional but did not rise to the level of reckless disregard. Fair Hearing No. 19,448.

In petitioner's case, there are a number of factors to consider. Petitioner made a mistake when she dunked A.M. rather than use other de-escalation techniques or ask for help. The question remains whether petitioner's behavior rises to the level of reckless disregard likely to cause unnecessary harm, pain or suffering to A.M.

First, despite petitioner's experience at deescalating her students' problem behaviors, she did not apply her experience when A.M. acted up in the pool. Petitioner did not ask for help although L.Si. was close by and available. M.J.R. was surprised that petitioner did not ask for help given petitioner's past history.

Second, petitioner's explanation that she thought A.M. would associate the dunking with fun and then settle down is not credible. On other occasions, petitioner and A.M. playfully dunked at the conclusion of his program and followed a routine in which petitioner verbally cued A.M. that he was about to be dunked. On this occasion, the petitioner dunked A.M. during his program, without verbal cues, and at a time when A.M. was acting out. Testimony indicated that the dunking was not playful. Petitioner's explanation appears as an after the fact attempt to explain what occurred.

Third, petitioner's co-workers witnessed the incident. With the exception of Ma.C., the others were surprised and bothered by what they witnessed. Petitioner's behavior was not consistent with her past work with special needs students.

Fourth, petitioner was upset by her actions. She commented about her discomfort that same day to L.Sa. after finishing A.M.'s crunches and to L.Si. at the end of the pool program. Petitioner sought out M.J.R. at the end of that school day and shared her frustration and discomfort over the pool incident. Her uneasiness shows a realization that her behavior was inappropriate.

Fifth, A.M. was not harmed. He performed his crunches and continued with his pool program until it was time to leave the pool.

Petitioner's actions, although troubling, do not constitute reckless disregard. No unnecessary harm, pain or suffering happened to A.M. Although petitioner's actions could have done so, they were not likely to do so. DAIL has not shown by a preponderance of evidence that petitioner's action rose to the level of abuse as defined in subsection B of the statute.

There is also the issue whether petitioner's dunking of A.M. should be reasonably expected to result in agitation or disorientation.<sup>1</sup> Dunking a person without warning during a set pool program could cause disorientation or agitation. Although L.Si. testified that she attributed A.M. looking agitated to the dunking, no one else did. The testimony indicated that A.M. was agitated prior to and during the dunking but not afterwards. After three dunks in less than twenty-five (25) seconds, A.M. started his crunches and then completed the remainder of his program. His ability to get back on track is not consistent with disorientation or

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<sup>1</sup> Subsection E of the abuse definition lists other effects, but the testimony does not support a discussion of them.

agitation. DAIL has not shown by a preponderance of the evidence that petitioner's actions rise to the level of abuse as defined in subsection E of the statute.

DAIL asked that the Board have the hearing officer reconsider the decision prior to a Board decision. Several days prior to the Board meeting, the Hearing Officer received a Motion to Reconsider the Recommended Decision. The Hearing Officer declined to reconsider the Recommended Decision. The Board concurs in this decision. The Board chose not to have the matter reconsidered.

Based on the foregoing, DAIL has not shown by a preponderance of the evidence that petitioner should be substantiated for abuse. DAIL's decision is reversed. 3  
V.S.A. § 3091(d).

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